

**ORIGINAL**

NO. 90-5796

Supreme Court, U.S.  
F I L E D

OCT 23 1990

JOSEPH P. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, WARDEN,  
GEORGIA DIAGNOSTIC AND  
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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**OCT 24 1990**

OFFICE OF THE CLERK,  
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider an issue regarding the alleged failure of the circuit court to afford a presumption of correctness under 28 U.S.C. § 2254(d) to a state court fact finding when this issue was not properly raised below?

II.

Should this Court grant certiorari to consider a conflict of interest claim where the alleged adverse impact presented to this Court is not the same theory as presented below and where the circuit court properly applied existing precedent to find no Sixth Amendment violation?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Jimmie Burden, Jr., was indicted by the Washington County, Georgia, Grand Jury upon special presentment during the December Term 1981 for the murders of Louise Wynn and her three children, which had occurred on or about August 16, 1974. (Trial Record 9-10). As the state sought the death penalty, the case was tried under Georgia's Unified Appeal

Procedure. Upon a jury trial beginning March 1, 1982, Petitioner was found guilty on all four counts. (Trial Record 10). The jury found the existence of four statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2) and sentenced Petitioner to four death sentences. (Trial Record 37-40). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions and three death sentences; the death sentence for Louise Wynn, however, was set aside as "mutually supporting" the death sentences for the other three murders. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1983), cert. den., 460 U.S. 1103, reh'g. den., 462 U.S. 1112 (1983).

Pursuant to an outstanding execution date, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on July 13, 1983, and sought a stay of execution and leave to proceed in forma pauperis. The stay of execution as well as pauper's status was granted. Petitioner twice amended the petition. An evidentiary hearing was held on October 24, 1983. A second evidentiary hearing was set for March 1984 by order filed January 13, 1984. In a letter to the court dated March 1, 1984, Petitioner stated he had no additional evidence to present at a hearing, tendered an affidavit, and requested leave to file a brief. Respondent concurred that no additional hearing was necessary but objected to the admission of a affidavit. Briefs were then submitted on behalf of the parties. Petitioner then attempted to amend the

petition, and Respondent opposed any amendment. On June 29, 1984, the state habeas corpus court denied leave to amend because the hearing had been held and the record closed.

On September 6, 1984, the state habeas corpus court entered an order denying relief. Respondent moved for reconsideration of a portion of the order regarding the grand and traverse jury composition issue. On September 24, 1984, the state habeas corpus court granted the motion for reconsideration and vacated that portion of its order previously dealing with the jury composition issue; the court then specifically ruled that the jury issue had been procedurally defaulted under Georgia law due to the lack of timely objection and ruled there had been no showing of cause and actual prejudice. Petitioner then filed a notice of appeal as well as an application for a certificate of probable cause to appeal. The Supreme Court of Georgia denied the application on March 5, 1985. Certiorari was denied. Burden v. Kemp, 474 U.S. 865, 106 S.Ct. 187 (1985).

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, raising only the claim that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. Respondent moved to dismiss the petition as successive. On February 3, 1987, the state habeas corpus court dismissed this second petition as successive. The Supreme Court of Georgia denied the application for a certificate of

probable cause to appeal on March 11, 1987. The remittitur was made the judgment of the state habeas corpus court on September 9, 1987.

Petitioner then filed an application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. (R1-4). Pursuant to the show-cause order of the magistrate, Petitioner filed a brief in support of the petition on March 16, 1988. (R1-6). An answer, brief and exhibits were subsequently filed by Respondent. (R1-7, 8, 9). Petitioner filed a reply brief. (R1-10). Respondent then filed a motion and brief to strike previously unsubmitted evidence, consisting of a consent order in an unrelated civil action, as the order had been entered five months before Petitioner's first state petition was denied. (R1-11).

On July 12, 1988, the district court entered an order, denying habeas corpus relief. (R1-13). Judgment was entered in favor of Respondent on that same date. (R1-14).

Petitioner subsequently filed a notice of appeal, a motion for leave to proceed in forma pauperis and an application for a certificate of probable cause. (R1-15, 16, 17). The district court denied probable cause and leave to proceed as a pauper. (R1-18). The Eleventh Circuit Court of Appeals subsequently granted the application for a certificate of probable cause and an appeal followed.

Following the submission of briefs and oral argument before a panel of the Eleventh Circuit, the Court remanded the case for an evidentiary hearing on the sole issue of the alleged conflict of interest claim. Burden v. Zant, 871 F.2d 956 (11th Cir. 1989). Pursuant to the remand, an evidentiary hearing was held in the district court on June 1, 1989. Counsel for the parties thereafter submitted proposed orders to the district court. On September 20, 1989, the district court found that the factual basis underlying the conflict of interest claim lacked merit and that Petitioner had failed to establish that a conflict of interest existed. Petitioner thereafter filed a notice of appeal from the adverse decision.

On May 29, 1990, the panel entered its opinion, affirming the denial of habeas corpus relief as to all grounds. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990).<sup>1</sup> Petitioner thereafter filed a motion to vacate opinion, permit briefing and oral argument on or about June 8, 1990, as well as file a motion to toll the time for filing a petition for rehearing and suggestion for rehearing en banc. After Respondent filed a response to the motion, the Eleventh Circuit

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<sup>1</sup> Judge Vance had been a member of the panel who heard oral argument but did not participate in the post-remand decision due to his death.

ordered the parties on June 29, 1990, to file letter memoranda on the conflict of interest claim. On July 24, 1990, the Eleventh Circuit denied Petitioner's motion to file a petition for rehearing and suggestion for rehearing en banc out of time. Petitioner then filed a motion for reconsideration of that denial on July 25, 1990. The petition for rehearing was denied on September 5, 1990. Petitioner thereafter filed a motion for stay of the mandate pending application for certiorari, and the Eleventh Circuit denied that motion on September 19, 1990. The mandate of the circuit court issued September 19, 1990, and was made the judgment of the district court on September 20, 1990.

Petitioner has now filed the instant petition for writ of certiorari seeking review of the Eleventh Circuit panel opinion denying habeas corpus relief and in particular the ruling on the conflict of interest issue. Inasmuch as the facts regarding the crimes themselves are not directly implicated by the issues before the Court, Respondent relies upon the statement of facts set forth in the Eleventh Circuit opinion which also incorporates the facts found by the Supreme Court of Georgia on direct appeal. See Burden, 903 F.2d at 1355-57.

## PART TWO

### REASONS FOR NOT GRANTING THE WRIT

- I. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE REGARDING THE ALLEGED FAILURE TO AFFORD A PRESUMPTION OF CORRECTNESS TO A STATE COURT FACT FINDING AS THIS ISSUE WAS NEVER RAISED IN THE DISTRICT COURT AND IMPROPERLY RAISED BELOW.

Petitioner has presented two questions to this Court in the instant petition for writ of certiorari. Initially, Petitioner urges this Court to grant certiorari to consider the alleged failure of the circuit court to afford a presumption of correctness to a state court "factual finding" under 28 U.S.C. § 2254(d). Pretermittting the question of whether this raises a constitutional issue for resolution by this Court, Respondent urges this Court to decline to grant certiorari to consider this question as this issue was never raised before the district court as a factual or legal matter, was given only passing reference by Petitioner in the letter brief which the circuit court requested, and was not raised as a substantive legal issue in the petition for rehearing/suggestion for rehearing en banc.

As noted in the statement of the case above, this case was remanded by the circuit court following oral argument before a panel of that court. Petitioner had never asserted that the state trial judge allegedly made any factual finding in the trial report regarding any alleged grant of immunity to prosecution witness Henry Lee "Acid" Dixon, Petitioner's nephew. In the post-hearing proposed order submitted by Petitioner in the district court, Petitioner never included this as an alleged fact or any basis for decision by the district court. In the letter memorandum of July 9, 1990, which Petitioner submitted in the Eleventh Circuit, Petitioner for the first time claimed that the state trial judge made a factual finding in his post-trial report that Dixon had been granted immunity and that this factual finding was entitled to a presumption of correctness, without citing the code-section or any authority and certainly not raising this as a substantive legal issue. Rather, in the fourteen page letter memorandum, Petitioner asserted two issues: (1) "the district court failed to utilize the appropriate legal standard" and (2) "Jimmy Burden's counsel labored under an actual conflict of interest which adversely effected their performance." (Petitioner's letter memorandum, p. 4, 7). For the first time in the out-of-time petition for rehearing and suggestion for rehearing en banc did Petitioner assert that the district court and circuit court erred in refusing to accept this alleged

state court "fact finding." Respondent submits that Petitioner failed to properly raise this issue below as this alleged underlying "fact" had never been cited nor relied upon by Petitioner until after the panel entered its decision following the remand. Clearly the basis for asserting this had been available to Petitioner in the first appeal of this case and in the remand to the district court. Under these facts, Respondent submits Petitioner failed to raise this issue properly below so that this Court should decline to consider this issue.

II. THE ELEVENTH CIRCUIT PROPERLY FOUND

NO CONFLICT OF INTEREST EXISTED.

In the second issue before this Court, Petitioner urges this Court to grant certiorari to consider the propriety of the circuit court opinion finding Petitioner's trial counsel did not labor under an actual conflict of interest and that Petitioner had failed to establish any adverse impact as a result. Petitioner now contends that the trial judge abrogated his alleged duty to inquire sua sponte into Petitioner's representation, a factual and legal theory never raised by Petitioner until his letter memorandum. Petitioner also contends that Henry Dixon allegedly testified upon a grant of immunity from the prosecution secured by one public defender so that this constitutes the alleged adverse impact, but the district court and Eleventh Circuit found to the contrary.

The problem with the conflict of interest issue in this case is that it has been a "chameleon" throughout the history of this litigation. Petitioner was represented by public defender Michael Moses at the 1982 murder trial. In Petitioner's first state habeas corpus petition, paragraphs 11-19, Petitioner contended he received ineffective assistance of counsel from trial counsel Michael J. Moses, because "at the time of the trial, counsel was preparing for his unsuccessful campaign for district attorney in the Middle Judicial Circuit

of Georgia," so that running for this office prejudiced Petitioner. Petitioner filed a second amendment to this petition claiming that the office of the public defender represented both "Petitioner at his trial and the key prosecution witness, Henry Lee Dixon" and that the public defender's office had represented Dixon in connection with the same murder charges upon which Petitioner was convicted. (Second Amendment, para. 60). In the post-hearing brief filed by Petitioner in the state court, Petitioner asserted that the alleged conflict of interest arose when the previous public defender, Kenneth Kondritzer, allegedly requested a preliminary hearing for Dixon but did not request a preliminary hearing for Petitioner. (Post-hearing brief, Respondent's Exhibit No. 2S below, p. 2-3). Petitioner claimed that at Dixon's preliminary hearing, Henry Lee Dixon "gave an exculpatory statement which incriminated Jimmy Burden." Id.

In his federal habeas corpus petition, ground A, paragraphs 10-16, Petitioner asserted that the Office of the Public Defender represented both Petitioner and Henry Lee Dixon at the time of Petitioner's trial so that this constituted a conflict of interest. Petitioner also asserted:

At the preliminary hearing [Dixon's],  
Mr. Kondritzer presented testimony of  
Henry Dixon in which he testified in a  
manner to exculpate himself while  
incriminating Jimmy Burden.

(Federal Petition, p. 7, para. 12). This was the form of this claim which was briefed in the Eleventh Circuit following the initial denial of relief by the district court and asserted in the oral argument before the panel of that court. It was this assertion - i.e., that former public defender Kondritzer presented the testimony of Henry Dixon against Petitioner at the state preliminary hearing that was the premise for the remand. Burden, 871 F.2d at 957.

At the federal evidentiary hearing, Respondent introduced a transcript of Dixon's state preliminary hearing which showed that Dixon was not even present at his own state preliminary hearing, much less testify against Petitioner. (Federal Transcript, p. 34-35; District Court Order, p. 4-5).

Following the remand, the Eleventh Circuit found:

Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondritzer's representation of Dixon had required him to sacrifice Burden, reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that the serious allegation is factually incorrect: Kondritzer, while representing Burden, did not call Dixon

to the stand and elicit testimony manifestly prejudicial to Burden. Kondritzer's representation of Dixon at Dixon's committal hearing consisted of brief cross-examination [of chief deputy Rogers, the "only witness"] that in no way damaged Burden, argument that there was no probable cause to hold Dixon, and opposition to the material witness bond set to insure Dixon's presence--and testimony prejudicial to Burden--at Burden's trial. Thus, while there was a potential conflict of interest--which no doubt would have materialized had Kondritzer continued to represent both Burden and Dixon--all charges against Dixon were dropped, and the conflict never became actual in the sense that Kondritzer's representation of Dixon's interest required him to compromise Burden's interests.

Burden, 903 F.2d at 1359. (Emphasis in original).

Petitioner now urges this Court to grant certiorari to consider whether the trial court abrogated its alleged duty to inquire sua sponte into the representation of Petitioner by the

office of the public defender, a legal theory which was not initially raised in the district court on the Eleventh Circuit or presented as a basis for resolution. It was not raised in the district court remand proceeding. The Eleventh Circuit has a rule against deciding issues not raised in the district courts. Stephens v. Zant, 716 F.2d 276 (11th Cir. 1983). Thus, Respondent submits that any question of whether the trial court had a duty to inquire sua sponte into an alleged conflict of interest is not properly before the court.

Petitioner also complains of the finding of the circuit court that Dixon did not testify at trial under any grant of immunity and, as noted above, asserts that the factual findings of the district court and Eleventh Circuit are erroneous because of a statement of the trial judge in the trial report that Dixon allegedly had immunity. Respondent submits that Petitioner simply failed to discharge his duty below to establish that the factual findings of the district court were clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. Amadeo v. Zant, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1771 (1988). The district court heard testimony from former public defender Kondritzer, public defender Moses and prosecutor Malone and noted the absence of any documentary evidence establishing that Dixon had in fact been granted immunity. The district court found that after Dixon's preliminary hearing, former public defender Kondritzer had "informal discussions"

with prosecutor Malone about what would ultimately happen to Dixon, that Kondritzer recalled that these discussions resulted in only "an understanding, you know, as long as he testified, nothing would happen to him," and that the practice in that circuit for any grant of transactional immunity was by formal agreement. (District Order, p. 4-5). The circuit court found that neither Kondritzer (who never represented Petitioner on the murder charges) nor Moses secured any formal agreement with the prosecutor for immunity for Dixon so that Petitioner "can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." Burden, 903 F.2d at 1360.

The Eleventh Circuit also found that public defender Moses, who actually represented Petitioner at the March 1981 murder trial, did not actively represent Dixon while Dixon was being held on material witness bond. Id. Relying upon this Court's decision in Burger v. Kemp, 483 U.S. 776 (1987), the court simply assumed without deciding that two attorneys employed by the same public defender's office could be considered one attorney but found no actual conflict ever manifested itself, much less any adverse impact as a result. Burden, 903 F.2d at 1360-61. The court found that Kondritzer represented Petitioner on unrelated burglary charges and only represented

Dixon on the murder charges until they were dropped, and Kondritzer thereafter left the public defender's office. Id. Before Kondritzer's departure, the two attorneys never jointly participated in either Petitioner's or Dixon's case. Id. Public defender Moses never took any affirmative action to represent Dixon even while Dixon was being held on the material witness bond, interviewed Dixon for the first time in preparation for Petitioner's murder trial and "vigorously cross-examined Dixon" at trial. Id. The court noted that public defender Moses even opposed the state's request that the material witness bond be dissolved after Dixon testified. Id.

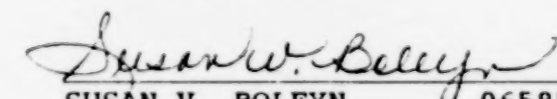
Now, in another chameleonic transformation of the conflict of interest claim, Petitioner asserts that it must have been attorney Kondritzer who labored under an actual conflict of interest, although Kondritzer never represented Petitioner on the murder charges as Kondritzer allegedly secured immunity for Dixon. Respondent submits that the Eleventh Circuit properly resolved the issues based upon the existing record and correctly concluded Petitioner failed to establish an actual conflict of interest or any adverse impact as a result. Cuyler v. Sullivan, 446 U.S. 335 (1980); Burger v. Kemp. Respondent further urges this Court to decline to grant certiorari as the decision of the Eleventh Circuit is factually and legally correct.


#### CONCLUSION

Wherefore, because Petitioner has presented questions to this Court which were not properly raised below and where the decision of the circuit court is demonstrably in accord with decisions of this Court and presents no new question for review, Respondent prays that this Court deny certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day, within the time required for filing, served a true and correct copy of this Brief in Opposition upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Joseph M. Nursey  
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This 15<sup>th</sup> day of October, 1990.

Paula K. Smith  
PAULA K. SMITH  
Assistant Attorney General

APPEARANCE FORM

**SUPREME COURT OF THE UNITED STATES**

No. 90-5796

Jimmie Burden, Jr. <sup>vs.</sup> Walter Zant, Warden  
(Petitioner) (Respondent)

The Clerk will enter my appearance as Counsel of Record for Zant

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Paula K. Smith

(Type or print) Name Paula K. Smith

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**Rule 9**

**APPEARANCE OF COUNSEL**

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

